IN THE LABOUR COURT OF SOUTH AFRICA

Held at Port Elizabeth

Case Nos:P14/98
P193/98

In the matter between:

NDIMA AND 125 OTHERS
Applicants

and

Respondent

JUDGEMENT

ZONDO J:

[1] Introduction

This matter came before me as a stated case. The parties filed a joint statement of agreed facts. It is convenient to set those facts out before the issues that arise in this matter can be dealt with.

The agreed facts

[2] The respondent is a registered company which carries on the business of making blankets at 31 Philip Frame Road in East London. Prior to

the 19th April 1997 the respondent had over 1000 employees in its employ. The applicants in this matter were among such employees.

[3] On the 19th April 1997 the respondent was placed under provisional liquidation by an order of the Eastern Cape Division of the High Court.

[4] Subsequent to the granting of the provisional liquidation order, joint provisional liquidators were appointed and it was arranged that they would continue to run the respondent's business pending either the disposition of the respondent's business, the disposition of the assets of the business or pending a scheme of arrangement contemplated in sec 311 of the Companies Act, 1973 (Act No 61 of 1973) (**"the Companies Act"**).

[5] On the 22nd April 1997 the respondent informed its employees including the applicants, that by reason of the granting of the provisional liquidation order, their contracts of employment had terminated.

[6] The Joint provisional liquidators concluded temporary contracts of employment with the majority of the employees of the respondent excluding the applicants.

[7] On or about the 17th July 1997 the Eastern Cape Division of the High

Court granted leave for the convening of meetings of creditors to consider a proposed scheme of arrangement in terms of sec 311 of the Companies Act.

[8] On or about the 8th August 1997 the scheme meetings to discuss the proposed scheme of arrangement were duly held in East London pursuant to the order of the High Court. The proposed scheme of arrangement was agreed to at the meetings.

[9] On the 21st August 1997 the scheme of arrangement was sanctioned by the Eastern Cape Division of the High Court and the provisional liquidation order was discharged.

[10] Following upon the sanctioning of the scheme of arrangement, the applicants tendered their services but the respondent refused to take them into its employment.

[11] Some of the applicants endeavoured to prove their claims against the respondent.

[12] Throughout the relevant period the respondent's business continued in operation as it had prior to the provisional liquidation order.

[13] At all times material to this matter the respondent's business of making blankets had continued without interruption.

[14] The essence of the scheme of arrangement was that a company known

as Dacman Investments (Pty) Ltd bought shares in the respondent.

[15] According to the parties the effect of sec 38 of the Insolvency At, 1938 (Act No 24 of 1938) (**“the Insolvency Act”**) as applied to companies by sec 339 of the Companies Act, 1973 (Act No 81 of 1973) (**“the Companies Act”**),

was that the granting of the provisional liquidation order terminated the contracts of employment of the employees of the respondent at that time.

[16] So much for the facts.

Procedural aspects of the proceedings

[17] By agreement between the parties the issue of what relief would be appropriate if the applicants proved their claim successfully has been left over for determination at a later stage if the matter reaches that stage. By virtue of this agreement I am not entirely certain what the precise relief is that the applicants seek in this Court because the issue of relief does not arise at this stage of the proceedings.

[18] However, irrespective of the precise terms of the relief the applicants may end up seeking in this Court if that stage is reached, their claim is entirely founded upon the provisions of sec 197(2)(b) read with sec 197(1)(a) of the Labour Relations Act, 1995 (Act No 66 of 1995) (**“the Act”**). Save to paraphrase the gist of sec 197(2)(b) in order to

facilitate the reader's understanding of what I have to say even at this stage of the judgement, I do not intend to quote its provisions at this stage because I will be quoting them shortly - and when I do, it will be more convenient to do so. In so far as they are relevant to this matter, loosely paraphrased, those provisions say, if a business or part of a business is transferred from one employer to another employer in certain circumstances, unless otherwise agreed, the contracts of all employees that were in existence at a certain defined point transfer automatically from the old employer to the new employer. The dispute between the parties is whether or not sec 197(2)(b) is applicable to this case. If it is, then the respondent was wrong in not allowing the applicants back at work. If it is not, then the respondent was correct. The applicants contend - obviously - that it is - whereas the respondent contends
that it is not.

[19] The Court is therefore asked to determine whether sec 197(2)(b) is applicable to this matter. If it finds that it is, that will open the way for the matter to proceed to the issue of relief subject, with the leave of the Court, to such other arrangements as the parties may agree upon. If the Court finds that sec 197 is not applicable, that would be the end of the matter in this Court. However, before the Court can consider whether sec 197(2)(b) is or is not applicable, it will be necessary for the Court to consider a point of objection to its jurisdiction that has been taken by the respondent.

The jurisdictional point

[20] The respondent has taken the point that this Court has no jurisdiction to entertain the applicants' claim - be it for reinstatement or compensation - and that, accordingly, this Court should decline to entertain the applicants' claim. Simply stated, the respondent's objection is based on a judgement which was handed down by Landman J in this Court on the 10th October 1998 in the matter of **South African Agricultural Plantation and Allied Workers Union v H. L. Hall and Sons (Group Services) Ltd & Others Case NoJ2858/98** which is as yet unreported.

[21] On the basis of Landman J's judgement, which I will deal with shortly, the respondent submitted that, in the light of the termination of the contracts of employment of the applicants upon the granting of the provisional liquidation order *ipso iure* by reason of sec 38 of the Insolvency Act the applicants had only **"a claim for damages but nothing more"** (see par 21 of Landman J's judgement in **H. L. Hall and Sons**) which they could only pursue in the High Court in terms of the insolvency law as **"the reach of the Labour Relations Act of 1995 halts once insolvency enters the picture"**. (see par 22 of Landman J's judgement in **H. L. Hall & Sons**).

[22] Mr Brassey, who, together with Mr Wade, appeared for the applicants, submitted that in so far as Landman J said once insolvency has entered

into the picture, employees' claim would be limited to a claim for damages to be pursued in the High Court, his decision was obiter as to make a pronouncement on such an issue was not necessary having regard to the matter that was before him. Mr Gauntlett, who, together with Mr Franklin, appeared for the respondent, submitted that Landman J's remarks in this regard formed part of the *ratio decidendi* of his judgement.

[23] In Hall's case the applicant was seeking an interdict restraining the respondents in that case from dismissing the applicant's members which the applicant alleged they had threatened to do in the course of the week following the one in which the application was launched. Although the employers were separate and, apparently, autonomous, they were related. The parent company of these companies by whom the affected members of the applicant union were employed was going to apply to the high Court for the liquidation of those companies.

[24] The companies which the parent company was to seek to put under liquidation informed their employees that, upon liquidation, the employees' contracts of employment would come to an end. It would appear that the applicant union perceived this as a threat by the companies to dismiss its members. For this reason the applicant union brought an urgent application which was heard by Landman J.

[25] There is no indication in Landman J's judgement that the jurisdiction

of the Labour Court was in issue nor is there any indication that the applicability or inapplicability of the Labour Relations Act, 1995 was an issue in the matter. The issue before Landman J would appear to have been whether there was going to be a dismissal of the applicant's union members and, whether, if such dismissal occurred, same would be unfair and whether the requirements for a final interdict had been satisfied.

[26] In the end it would appear that whether or not there was to be a dismissal turned on the effect of sec 38 of the Insolvency Act on contracts of employment. Landman J concluded that sec 38 has the effect of *ipso iure* terminating the contracts of employment of employees. As such termination would not be brought about by any act of the employer, Landman J concluded that the Court could not interdict such a termination.

[27] In my view once Landman J had come to the above conclusion, it was not,
strictly speaking, necessary to pronounce on whether or not a claim for damages is or is not the only claim workers have in an insolvent situation nor do I think it was necessary for him to make the remark he made about
the reach of the Labour Relations Act, 1995 once, as he put it, insolvency enters the picture. However, I am satisfied too that Landman J could also not have intended his remarks to be anything

other than remarks made obiter. In those circumstances I conclude that Landman J's remarks relied upon by Mr Gauntlett do not form part of the *ratio decidendi* of his judgement in **H. L. Hall & Sons** case. For that reason I would dismiss the respondent's objection to the jurisdiction of this Court.

[28] In any event and in addition to the view I have expressed above, I am of the opinion that, in the light of the applicants' case in this matter, the respondent's objection begs the question which is raised by the applicants' contention. As will be seen later in this judgement, the applicants' case is that, notwithstanding their acceptance for purposes of these proceedings that upon the granting of the provisional liquidation order, their contracts of employment terminated *ipso iure* by virtue of sec 38 of the Insolvency act, sec 197(2)(b) has the effect that their contracts were regenerated and were transferred ultimately back to the respondent. If that argument is correct, then the fact that by virtue of sec 38 their contracts of employment had previously terminated is neither here nor there. I now turn to the merits of the claim.

<u>The merits</u>

[29] Before analysing the provisions of sec 197, it may be useful to say a thing or two about schemes of arrangements because a scheme of arrangement features prominently in this dispute.

[30] Schemes of arrangements are provided for in sec 311 of the Companies Act. Sec 311 of the Companies Act provides as follows :-

"311 Compromise and arrangement between company, its members and creditors.

(1) Where any compromise or arrangement is proposed between a company and its creditors or any class of them, the Court may, on the application of the company or any creditor or any member of the company or, in the case of a company that is being wound up, of the liquidator . . . ., order a meeting of creditors or class of creditors or of members of the company or class of members (as the case may be) to be summoned in such manner as the Court may direct".

[31] In terms of sec 311(2) read with ss(4) and ss(5) the Court has power to sanction a scheme of arrangement. In this regard the Court is required to have regard to the number of those who voted in favour of the scheme of arrangement and to the report which the liquidator is required to make to the Master in terms of sec 400(2) of the Companies Act. The arrangement is required in terms of sec 311(2) to be agreed to by:-

(a) a majority in number representing three-fourths in value of the creditors or class of creditors; or

(b) a majority representing three-fourths of the votes exercisable by the members or class of members, (as the case may be) present and voting either in person or by proxy at the meeting ordered by the Court.

If such a scheme of arrangement is sanctioned by the Court, it becomes binding on all the creditors or the class of creditors or on the members of the company and also on the company or on the liquidator if the company is being wound up. In terms of sec 311(8) reference to a company in sec 311 means **"any company liable to be wound up under this Act . . ."**

[32] In **ex parte Millman and others NNO: In re Multi - Bon (Pty) Ltd 1987(4) SA 405 (C)**, Berman J, speaking for a Full Court, referred to sec 311(1) and said:-

" . . the scope and purpose of the section is strictly limited to considering an arrangement between the company and its creditors, and not to an arrangement between its creditors or between its creditors and a third party".

In **Henochberg on the Companies Act**, Meskin, after referring to a statement by Trollip J (as he then was) in **Du Preez v Garber: In re Die Boere Bank Bpk 1963 (1) SA 806 (w) at 813** where the learned Judge said arrangements contemplated in sec 103 of the companies Act, 1926 (Act no 46 of 1926) **"were subject to certain limitations of the widest character",** says :-

"...... the relevant scheme must have as its object the affecting of the respective rights and obligations inter se of the company and its members (or creditors) (Ex Parte NBSA Centre Ltd 1987 (2)

SA 783 (T) at 786 - 789), the achievement of such object by way of the use of the machinery of the section must be necessary in the sense that it cannot otherwise conveniently be achieved (ie by independent agreement between the company and each of the affected parties) (Ex parte Cyrildene Heights (pty) Ltd 1966 SA 517 (W) at 520 - 524; NBSA case supra at 795-796, 801); and the formalities in respect of a reduction of capital or in respect of any other matter for the achievement of which the Act prescribes a particular procedure must be observed (ibid at 801 - 802); since the section cannot be invoked itself to achieve a reduction of capital or any other such matter, the terms relating to the reduction or such other matter should not be conceived, or embodied, as part of the arrangement per se (ibid)".

[33] Although it is sec 197(2)(b) which is relied upon by the applicants to found their claim, it is necessary to quote not only sec 197 (2)(b) but also sec 197(1)(a) and (b) because, as for ss(1)(b), reference is made to it in ss(2)(b) and, as for ss(1)(a), in the course of a consideration of ss(2)(b), it becomes appropriate to have regard to ss(1)(a) - in fact it becomes appropriate to have regard to the whole section and the objects of the Act as a whole in order to ensure that ss(2)(b) is considered in the correct context and in the light of a full picture of sec 197.

[34] Sec 197 (1), (2), (3), (4) and (5) read thus :-

"97 Transfer of contract of employment

(1) A contract of employment may not be transferred from one employer (referred to as 'the old employer') to another employer (referred to as 'the new employer') without the *employee's* consent, unless-

***(a)* the whole or any part of a business, trade or undertaking is transferred by the old employer as a going concern; or**

***(b)* the whole or a part of a business, trade or undertaking is transferred as a going concern-**

(i) if the old employer is insolvent and being wound up or is being sequestrated; or

(ii) because a scheme of arrangement or compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency.

(2) *(a)* If a business, trade or undertaking is transferred in the circumstances referred to in subsection (1) *(a)*, unless otherwise agreed, all the rights and obligations between the old employer and each *employee* at the time of the transfer continue in force as

if they were rights and obligations between the new employer and each *employee* and, anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer.

(b) **If a business is transferred in the circumstances envisaged by subsection (1) *(b)*, unless otherwise agreed, the contracts of all *employees* that were in existence immediately before the old employer's winding-up or sequestration transfer automatically to the new employer, but all the rights and obligations between the old employer and each *employee* at the time of the transfer remain rights and obligations between the old employer and each *employee*, and anything done before the transfer by the old employer in respect of each *employee* will be considered to have been done by the old employer.**

(3) An agreement contemplated in subsection (2) must be concluded with the appropriate person or body referred to in section 189 (1).

(4) A transfer referred to in subsection (1) does not interrupt the *employee's* continuity of employment. That employment continues with the new employer as if with the old employer.

(5) The provisions of this section do not transfer or otherwise affect

the liability of any person to be prosecuted for, convicted of, and sentenced for, any offence".

[35] The real issue in this matter is a matter for the interpretation of sec 197 in general, and in particular, of the words **"<u>If a business is transferred</u>"** which appear at the commencement of sec 197(2)(b) of the Act. Mr Brassey submitted that sec 197 must be interpreted purposively. Mr Gauntlett agreed with this.

[36] In **Interpretation of Statutes**, 1st ed, at 36 Prof Devenish quotes Lord Denning as saying the following in **The Discipline of law (1979) at 20-1** about the approach of the continental courts on interpretation which Lord Denning believed should be emulated:-

" When they come upon a situation which is to their minds within the spirit - but not the letter-of legislation, they solve the problem by looking at the design and purpose of the legislation - at the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect."

[37] Devenish then refers at 36 to the case of **Ebrahim v Minister of the Interior 1977 (1) SA 665 (A)** and says the majority and minority judgements in that matter provide a good comparison between the literalist approach and the purposive approach. In **Ebrahim v Minister of the Interior 1976 (1)SA 878 (D**) the applicant made an

application to the High Court for a declarator that he had not lost his South African citizenship when he was granted British citizenship pursuant to his application for the UK citizenship. The applicant was a seaman and a South African. He lived in Durban when he was not at sea. When the applicant applied for UK citizenship, he was in the UK. On the day that he was granted the UK citizenship, the applicant happened to be in Port Elizabeth - South Africa - apparently for just one or two days. There was a statutory provision in S.A. which read:-

"A South African citizen who whilst outside the union, and not being a minor, by some voluntary and formal act other than marriage, acquires the citizenship or nationality of a country other than the union, shall thereupon cease to be a South African citizen."

[38] In dealing with the applicant's application, the Court of first instance held that the word **"acquires"** in the statutory provisions refers to what the applicant did when he took the steps he took to get the citizenship and not when he was granted citizenship. That had occurred whilst the applicant was outside the country and therefore the statutory provisions applied to him and he had therefore lost his S.A citizenship. The applicant's application was then dismissed. In the course of his judgement in this case Van Heerden J said at 883E : **"A court will . . . construe a statute so as to defeat all attempts at evasion".**

[39] On appeal in **Ebrahim v Minister of interior 1977 (1) 665 (A)** the appeal was allowed by a majority of five to three. The minority judgement was given by Rumpf CJ. Jansen JA concurred in Rumpf CJ's judgement. In interpreting the relevant statutory provisions the majority took the view that the word **"acquire"** in the statutory provisions meant to gain or receive and that, if the appellant gained or received the citizenship of the UK when he was in SA, the statutory provisions would not apply. The Appeal Court held that, as the applicant was in SA on the day he was granted the UK citizenship, it could not be said that he had acquired such citizenship while outside SA. Rumpf CJ took a different view. He adopted what for all intents and purposes was a purposive approach of interpretation. He said if one adopted a literalist interpretation, it would be too easy to avoid the relevant provisions because a person would go out of the country, make an application for a citizenship of another country and quickly return to South Africa so that when the citizenship of that country was granted to him, he would not be outside S.A. as that would cause him to lose his S.A citizenship. Rumpf CJ held that in his view the section applied to the applicant's case and that the applicant had lost his S. A citizenship.

[40] Rumpf CJ referred to two passages in Prof Cowen's article titled **"Prolegomenon to a Restatement of the Principles of Statutory interpretation"** in Tydskrif vir die Suid Afrikaanse Reg 1976 (2) at p.131 and at 160 where it is said:

"Statutes are always passed to achieve a purpose. They have as some of the civilian writers put it, a ratio - and the detailed commands or prescription of the legislation stand in relation to the ratio or purpose as means to an end."

He also referred to the following passage in Cowen's article :-

"The practical consequences of various interpretations; that is to say, interpreter should evaluate the consequences of various possible interpretations - the idea being that the legislature must be presumed to have a sensible, fair and workable result."

[41] In **Dadoo v Krugersdorp municipality Council 1920 AD 530** the Court said : **"to carry out effectually the object of a statute it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitious manner that which it has prohibited or enjoined".** But in the same judgement, namely, **Dadoo**, the court also said : **"But an Act thus construed may nevertheless be evaded; parties may genuinely arrange their transactions so as to remain outside its provisions. Such a procedure is, in the nature of things, perfectly legitimate".** In **Dhanabakium v Subramanian 1943 AD 170 Centlivres JA** said : **" . . . it seems to me that if a reasonable construction of an Act does not lead to a casus omissus while another construction does lead to that result, the construction which should be applied is the one which does not lead to that result".** Lastly Rumpf CJ also approved a passage containing the

following, - also from Cowen's article: **"........... the factor which should tip the balance, where the competing claims of language and of 'non-linguistic factors' are equal, is precisely the ratio or purpose of the legislation."**

[42] While it would be inappropriate to be unduly concerned with the literal meaning of words in a statute at the expense of the purpose thereof, the mischief it sought to address as well as its history and context generally, it would be equally wrong, I believe, to totally ignore the language of the statute.

[43] It is accepted by both parties in this matter that upon the granting of the provisional liquidation order, possession and control of the respondent's business was transferred from the respondent to the Master of the High Court, then to the provisional liquidators and that, upon the sanctioning of the scheme of arrangement by the High Court, such possession and control were transferred from the provisional liquidators back to the respondent. The applicant's contention in this case as presented by Mr Brassey was that that transfer of possession and control is enough to bring the applicants within the ambit of sec 197.

[44] Not so, argued Mr Gauntlett. A distinction exists, and needs to be borne in mind, continued Mr Gauntlett, between, on the one hand, the transfer of a business, which is what is contemplated by sec 197, and,

on the other, the sale of the assets of a business, which is not necessarily contemplated in sec 197 and, the sale of shares which is what happened in this case and which is not what sec 197 contemplates.

[45] The applicant's problem arises from two facts. The one is that the respondent told them that upon the granting of the provisional liquidation order, their contracts of employment terminated (by operation of law). Both parties argued the matter on the basis of the correctness of this statement unlike in **H.L. Halls and Sons** case referred to above where, quite interestingly, both Senior Counsel appearing for both parties took the attitude that that is not the law. The second is that the respondent refused to allow the applicants back at work after the problems which had necessitated the provisional liquidation order had been resolved but allowed the majority of their colleagues to continue in its employ or to resume employment with it.

[46] If the legal position was that the granting of a provisional liquidation order did not have the effect of terminating the contracts of employment of the applicants in this case but, maybe, instead only suspended the same, subject to interim arrangements that provisional liquidators could make with the employees if so authorised, with a view to such contracts only terminating if the provisional order was confirmed or the suspension was uplifted by operation of law upon the discharge of the order, then the problem in this matter would not have

arisen.

[47] The idea behind sec 197 comes from The Transfer of Undertakings (Protection of Employment) Regulations 1981 of the UK by which it was meant to implement the EEC Council Directive 77/187. The regulations have been amended by sec 33 of the Trade Union Reform and Employment Rights Act, 1993 (TURERA 1993) in order to bring the regulations further into line with Directive 77/187.

[48] It may not be unhelpful to have a look at judgements of the English Courts as well as those of the European Court of Justice to see how they have approached some of the interpretational problems arising from the application of the regulations and the directive which the regulations seek to implement. In having regard to such judgements, it must be borne in mind, in my view, that the wording in the regulations and directives is not identical to that of sec 197 of our Act. Also this Court would bear in mind the particular context of the S.A. statute.

[49] In **Nokes v Dancaster Collieries 1940 AC 104** it was held that a contract of employment is not transferrable at common law without the consent of the parties to the contract. It was held also that such contracts were not automatically transferable under sec 154 of the Companies Act, 1929.

[50] In **Lloyd V Brassey [1969] 1 All ER** the transfer of a farm was held

to constitute the transfer of a business on the basis that the business of farming cannot be separated from the farm from which the business of farming is carried out. This is an exception from the principle which has been affirmed in numerous cases arising from the UK statute and from the EEC directive that a distinction exists between the transfer of assets, on the hand, and on the other, the transfer of a business, and that ,when the assets of a business are sold, that does not necessarily constitute the sale of the business. Dealing with the construction of the words " **change....in the ownership of the business"** then appearing in sec 13(1) of the Redundancy Payments Act, 1965, Lord Denning referred with approval to the test which was formulated by Wingery J in the Divisional Court in **Kenmir Ltd v frizel (1968) (3) ITR 159.**

[51] In **Kenmir Ltd v Frizel (1968) (3) ITR 159** the latter Court was dealing with the words: **" a trade or business or an undertaking.. is transferred from one person to another" -** which Lord Denning was of the opinion meant the same as **"change - in the ownership of the business."** Wingerey J had formulated the test for determining whether or not a business is transferred in these terms:

" In deciding whether a transaction amounted to the transfer of a business, regard must be had to its substance rather than to its form.... the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he could carry on without

interruption.” This last sentence was also approved by Russell J at 386.

At 385 B Lord Denning said :

“In my opinion the business of farming consists of cultivating the land, ploughing, . . . The land itself is the essence of the business, and when the land, together with the buildings, is sold, the business is necessarily sold with it. It remains the same business but it changes hands.”

[52] In **Young v Daniel Thwaites & Co Ltd [1977] ICR 877** it was held that there had been a transfer of business when a tenant, in a hotel, gave up his tenancy but the employee who had been employed by the tenant continued with his work as normal thereafter when the owners of the hotel, who were brewers and had been supplying the hotel with beer during the tenancy, continued the business that the tenant had been conducting in the hotel. In this case it was the provisions of par 9 of schedule 1 to the Contracts of Employment Act 1972 which had to be interpreted. In case those provisions may be relevant to this case, let me point out that these provisions read as follows:

“(2) If a trade or business or an undertaking .... is transferred from one person to another, the period of employment of an employee in the trade or business or undertaking at the time shall count as a period of employment with the transfer, and the transfer shall not break the continuity of the period of

employment."

[53] In **Melon v Hector Powe Ltd [1981] 1 All ER 313** Company A, which was a company of tailors, owned two factories. One was in Blantyre and the other in Dagenham. In both factories the company carried the business of making suites - mainly to measure. On the 17th January 1977 Company B, by agreement with company A, took over the Blantyre factory and the employees. It terminated the contracts of employment of some of the employees of company A in the factory - but then employed them on terms and conditions of employment not less favourable but on new contracts, Some of those employees claimed redundancy pay claiming that they had been dismissed.

[54] The employee's claims were made under the Redundancy Payments Act, 1965. The employees had to show that they had been dismissed by reason of redundancy. The defence advanced in resisting the claim was that the employees could not, in the light of sec 3(2) of the 1965 Act, be taken to have been dismissed for the purpose of claiming redundancy payment. This was so because one of the circumstances which sec 3(2) of the 1965 Act provided as disqualifying an employee from claiming redundancy payment was where the employee's contract of employment had been renewed or if the employee had been re-engaged by the same employer under a new contract of employment on terms that were not in essence different from the

terms of his previous contract. Sec 13 of the 1965 Act provided that sec 3(2) thereof applied in a similar way where a change occurred in the ownership of a business or of a part of a business and the new owner renewed the employee's contract of employment on terms not less favourable than those he had had before. In that case the employee's period of employment with the old employer was carried forward into the employment of the new employer and counted as a period of employment with the new employer and the change of employment did not break the continuity of employment.

[55] The matter turned on whether what had occurred with the Blantyre factory was a transfer of part of a business or merely a transfer of assets . Company B had been assigned the lease of the Blantyre factory. The plant and machinery in the factory were sold to Company B. Company B took over all work in progress and undertook to complete it. They took virtually the whole workforce.

[56] In that matter it was found that, except for a temporary continuance of the previous business, Company B undertook a different business. Following **Lloyd v Brassey [1969] 2 QB 98** the distinction between the transfer of a business and the transfer of physical assets was emphasised(see p 317H-I). Lord Fraser went on to state: **" It seems to me that the essential distinction between the transfer of a business or part of a business and a transfer of physical assets, is that in the former case, the business is transferred as a going concern so that**

the business remains the same business but in different hands............ whereas in the latter case the assets are transferred to the new owner to be used in whatever business he chooses. Individual employees may continue to do the same work in the same environment and they may not appreciate that they are working in a different business, but that may be the true position on consideration of the whole circumstances." It was therefore held that that had not been a transfer of a part of the business of Company A.

[57] In **Premier Motors v Total Oil Great Britain Ltd & others [1984] ICR 58**, **Premier Motors** were vendors and they employed one Mr Lowe and one Miss Dyer **("the applicants")**. The vendors carried on the business of a petrol filling station at Rochester. Another company in the same group as **Premier Motors** carried on the business of a petrol filling station at Romford. The freehold in both the Romford and the Rochester properties vested in another company in the group, namely, Triolocan. The vendors purchased both sites. No goodwill was assigned and none of the purchase price was appropriated to goodwill. There was nevertheless evidence that the purchase price had been negotiated with reference to the profitability of the company. The EAT refused to interfere with the decision of the tribunal that this transaction had constituted a transfer of the business and not a transfer of assets. It was said on the strength of **Melon v Hector Powe Ltd**

(1981 ICR 43 at 49) that whether there had been a transfer of business was a question of fact to be determined by the industrial tribunal.

[58] In **Foreningen af Arbejdfledere Danmark v Daddy's Dance Hall ALS [1988] IRLR 315** upon termination of a non-transferable lease of a business, the landlord had leased the business to a new lessee who then continued the same business as the previous lessee and took over the staff of the previous lessee. Some of the staff of the previous lessee had been dismissed but had not actually left the job. The European Court of Justice held that there had been a transfer of business in this case. The European Court of Justice said the objective of Directive 77/187 was to ensure as far as possible the safeguarding of employees' rights in the event of a change of proprietor of the undertaking and to allow them to remain in the service of the new proprietor on the same conditions as those agreed with the vendor. The Directive therefore applies as soon as there is a change of the natural or legal person responsible for operating the undertaking who, consequently, enters into obligations of an employer towards the employees working in the undertaking.

[59] In support of the applicant's contention that the facts of this case bring them within sec 197 (2) (b), Mr Brassey submitted that the fact that the section refers to an old employer and new employer was of no consequence because those phrases were definitional and the

legislature could as well have used X and Y instead of the phrases **"old employer"** and **"new employer"**. In further support of the applicants' contention he drew the court's attention to the fact that in ss(1)(b) there is no reference to the old employer and to the new employer whereas in ss(1) there is a reference to the old employer.

[60] It seems to me that this does not have the significance which Mr Brassey attaches to it because ss(2)(b) on which the applicants' claim is founded has a reference to the old employer and the new employer. It seems to me that, as far as the applicants' claim is concerned, it would be difficult to find that the reference to the old employer and to the new employer does not have much significance.

[61] Sec 197 (2)(b) envisages that certain rights and obligations flow from the transfer of a business. There is an entity which is automatically burdened with all the contracts of employees which existed immediately before the winding up or sequestration of the old employer but is not burdened with the rights and obligations of which existed between the old employer and each employee at the time of the transfer. The old employer and each employee remain seized with the latter rights and obligations.

[62] The cut - off point in ss(2)(a) is different from the cut-off point in ss(2) (b) the cut off point is the time of the transfer of the business. The section rights refers to and obligations existing between the old

employer and each employee **“at the time of the transfer.”**Effectively in so far as those rights and obligations are concerned, the new employer simply steps into the shoes of the old employer. This means that the new employer acquires such rights and obligations as the old employer had **“at the time of the transfer”** in relation to the employee. It also means that the employee continues to possess the rights he had at that time but now in relation to the new employer. The employee continues to owe the obligations he had at the time of the transfer to the old employer but now he owes them to the new employer.

[63] Ss (2)(a) refers to anything done before the transfer by or in relation to the old employer. It says that **“will be considered to have been done by the old employer”**. There is no need for something which was done by the old employer to be considered to have been done by the old employer. What was intended here was simply that the old employer remains liable for its actions and omissions before the time of the transfer. The old employer and each employee remain seized with the latter rights and obligations.

[64] It seems to me, from an analysis of sec 197 in general and ss(2)(b) read with ss(1)(b) in particular that the legislature bore in mind that at the time of the winding-up, the contracts of employment of the employees would have terminated by reason, maybe, of sec 38 of the Insolvency Act and that if it used the time of transfer only as a cut-off

point, that would not be effective to ensure that the employees did not lose their jobs in circumstances where the business continues.

[65] Having regard to all the above, the question still remains whether what occurred in this case was a transfer of business.

[66] I am unable to agree with Mr Brassey that the transfer of possession and control of a business is sufficient to bring the applicants within the ambit of sec 197. Quite clearly, the section requires the transfer of business in order for its operation to be triggered. The transfer of business and transfer of possession and control of a business are two separate concepts. I do not think that any justification can be found in the provisions of section 197 for stretching the meaning of the transfer of business that far. Certainly not in this case. As Mr Gauntlett so correctly pointed out, if the owner of a business asked another person to look after his business for him temporarily while he took leave - thereby granting such person possession and, to some extent, some control of his business in his absence, such person would be surprised if he were told that that meant that the business had been transferred to him. Depending on the situation of the business, after the initial surprise, he could be laughing all the way to the bank or he might very quickly try and get himself out of the business before he finds himself in more trouble than the business may already have brought him.

[67] In pressing his argument that no distinction should be drawn between

the sale of shares and the sale of a business, Mr Brassey submitted that, if such distinction as was contended for by the respondent was made, it would be very easy to avoid sec 197. To avoid sec 197, instead of parties concluding a sale of business, they would simply conclude a sale of shares.

[68] Mr Gauntlett's argument in regard to this was that, in a case where there was evidence that the purchase of shares was a simulation or a sham in order to avoid sec 197, the Court could go behind the sale of shares and, find that in truth the transaction was a sale of business. Mr Gauntlett submitted that not only is there no evidence in this matter that that is the case but, more than that, there is not even a suggestion along those lines. Mr Gauntlett stressed the point that a distinction has always existed between three transactions, namely, the sale of business, the sale of shares and the sale of assets of a business. He submitted that, if the Court held that a transfer of shares was a transfer of business under sec 197, the Court should be ready to also say a sale of assets of a business would fall within the ambit of sec 197.

[69] I do not think that if a transfer of shares was held to constitute a transfer of business for purposes of sec 197, it would necessarily follow that a sale of assets of a business also constituted a transfer of business under sec 197.

[70] Mr Gauntlett's answer to Mr Brassey's argument that, if the

transaction of the sale of shares in this case did not bring the applicants within the operation of sec 197 by virtue of the suggested distinction between the sale of shares and the sale of business, that will make it very easy for employers to avoid sec 197 is not a complete answer to Mr Brassey's argument. I say this because in most cases it would be very difficult for any one to prove that a particular transaction of the sale of shares was a simulation or a sham. Most transactions in which people circumvent the law look genuine on the outside and seem to be perfectly legitimate transactions.

[71] I can well foresee that, if it is held that the transaction in this case did not attract sec 197, many employers may well circumvent sec 197 by resorting to similar transactions - especially because it is not difficult at all to get a company placed under provisional liquidation. Once a company was placed under provisional liquidation, a scheme of arrangement involving the sale of shares such as the one involved in this case would be resorted to.

[72] I think the fundamental problem which is raised by this part of this matter is how far a Court can disregard the language of a statute in seeking to fulfill the purpose of a statutory provision. One view may be to say there is no limit and that, as long as the purpose of the section will be achieved by adopting a particular construction of a statutory provision, a Court may completely disregard the language. If that approach were adopted, it seems to me that no situation would

arise where the Court would conclude that there is a *casus omisus* in a statute and leave it to parliament to amend the statute.

[73] Another view would be to say, as far as possible, a court should strive for an interpretation which seeks to fulfil the purpose of a statutory provision even if this may mean it has to disregard some of the language in a statutory provision to some extent but that a court's right to disregard the language of a statute has a limit and the Court may not go beyond that limit.

[74] I prefer the latter approach because, in that way, the distinction between the roles of parliament and the courts does not become blurred and yet at the same time courts would not simply throw their hands in the air and say their function is to interpret the law and not to make the law each time a case arises which appears to require some departure from the literal meaning of the words of a statute.

[75] In real life the sale of shares in a company is used in order to gain not only control of the business but also in effect the business itself. But I also accept that the mere fact that a person buys shares in a company and thereby gains control of the company does not necessarily mean he is going to continue the same business.

[76] Although I well realise that it may be very easy for employers to circumvent sec 197 if it is held that the transaction in this case did not

attract sec 197, I am of the view that to hold otherwise would be to go far beyond the acceptable limit to which a Court may go in disregarding the language of a statute. I conclude therefore that in this matter the transfer of possession and control relied upon by the applicants was not enough to bring them within sec 197 and that sec 197 did not apply.

[77] I am of the opinion that there is a crying need for an amendment of sec 197 to cover the situation such as the one which occurred in this case. Accordingly Government, Business and Labour may do well to consider the desirability of such an amendment of sec 197. Another way to deal with the problem may be to amend sec 38 of the Insolvent Act to say upon the granting of a provisional liquidation order, existing contracts of employment are suspended pending the discharge of the rule or the granting of a final liquidation order. Upon the granting of a final liquidation order, the contracts of employment may then terminate by operation of law, or, upon the discharge of the provisional liquidation order, the suspension of contracts can be uplifted by operation of law and the contracts of employment may continue as before.

[78] With regard to costs I do no think that the requirements of law and fairness envisaged in sec 162 of the Act require a cost order be made. The case is in effect a test case for the application of sec 197. As the matter is a very complex one and, another Court may very well come

to a conclusion different to mine, and, in the light of the need for certainty on the applicability of sec 197, I intend to immediately grant the applicants leave to appeal to the Labour Appeal Court against the whole of my judgement.

[79] Therefore the order I make is the following :-

(a) The applicants' claim is dismissed;

(b) There is to be no order as to costs;

(c) Leave is hereby granted to the applicants to appeal to the Labour Appeal Court against the whole of this judgement.

R. M. M. ZONDO

Judge in the Labour Court of South Africa

rgument :29 October 1998

dgement :12 February 1999

pplicants :Mr M. Brassey SC. (with Mr R. Wade)

by : Bate Chubb & Dickson INC

spondent :Mr J. J. Gauntlett SC. (with Mr A. Franklin)

by : Levy, Feinsteins & Associates INC